88-890

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLIE ROACH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

G. DENNIS SHEEHAN
1300 First RepublicBank Tower
801 Cherry Street
Fort Worth, Texas 76102
(817) 878-0600

Counsel of Record

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 - Phone 817-332-4070

QUESTIONS PRESENTED

1. Is a conviction for conspiracy to manufacture phenylacetone, a schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846, appropriate absent proof of any underlying agreement to manufacture phenylacetone?

2. Is a conviction for manufacturing a controlled substance (under 21 U.S.C. § 841(a)(1)) where there is no evidence to connect a defendant to the alleged scene of the crime other than his status as tenant and when *all* testimony (including all government witnesses) indicates that there was no manufacturing occurring on or about the date alleged in the indictment, and that the alleged crime scene was merely a house full of "trash" and "junk"–an overly broad application of the statute in violation of Petitioner's constitutional rights?

3. Does 21 U.S.C. § 841(a)(1) sanction a conviction for manufacturing a controlled substance when the evidence demonstrates that the indispensable precursors to the controlled substance in issue were not present at the alleged crime scene, nor was the necessary equipment?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Charlie Roach, and Respondent, The United States of America. Ethel Allen Short was an additional Defendant in the proceedings below.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLIE ROACH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

The Petitioner Charlie Roach respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the Appendix hereto, A-1, *infra*. Petitioner's Motion for Rehearing was denied. The order denying same is reprinted in the Appendix hereto, A-8, *infra*.

The judgment of the United States District Court for the Northern District of Texas (Belew, J.) has not been reported. It is reprinted in the Appendix hereto, A-9, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 8, 1988, affirming Peti-

tioner's erroneous conviction dated November 7, 1987. The Court of Appeals denied a timely Petition for Rehearing on September 7, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 20.1.

STATUTES INVOLVED

21 U.S.C. § 841(a)(1). Prohibited Acts.

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . [.]"

21 U.S.C. § 802(15). Definitions.

> (15) The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly, or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice.

21 U.S.C. § 846. Attempt and Conspiracy.

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner borrowed between $600 and $800 from Tim Harrington after he moved out of Harrington's house. (Trial Court Record, Vol. II, p. 49.) Harrington expected to be repaid more than just dollar-for-dollar "because everybody gets a little interest." (Vol. II, pp. 46-47.) Under the terms of their agreement, Harrington was to receive one-half (1/2) of the profit Petitioner made "when he got back on his feet." (Vol. II, p. 47.) On the basis of this agreement to repay a loan from unspecified sources, though the record indicates that Petitioner's work on automobiles was the most likely source, the government charged Petitioner with conspiracy to manufacture phenylacetone. However, the record reflects absolutely *no* evidence of any agreement to manufacture phenylacetone and further fails to indicate that any of the alleged conspirators knew of any such agreement. In fact, Harrington testified without reservation that he never saw Petitioner manufacture phenylacetone, that he had no personal knowledge of Petitioner's manufacturing phenylacetone, that he did not know whether Petitioner was supposed to be "cooking [dope]," and that he had never seen Petitioner manufacture amphetamines, nor could he testify for a fact that Petitioner is able to manufacture methamphetamines. (Vol. II, pp. 47, 56, 65.) Harrington emphatically denied any agreement with Petitioner to manufacture phenylacetone, the crime Petitioner was charged with. (Vol. II, p. 56.) Further, Petitioner's co-defendant, Ethel Allen Short, clearly testified there was no agreement to manufacture phenylacetone and that she had no personal knowledge that Petitioner had ever manufactured methamphetamine or phenylacetone. (Vol. II, pp. 82-85.)

On November 7, 1985, Petitioner's landlord, Gary Manning, searched his rent house at 3463 Whittier in Fort Worth, Texas, after Petitioner failed to pay rent for October of 1985. (Vol. I, pp. 18-21.) Upon entering the house, Manning noticed large quantities of "trash" in the house. Concerned about the condition of the house, he called Craig Hopper of the Hurst Police Department (Vol. I, pp. 42-43). Hopper searched the house,

finding numerous items which led him to believe that there was absolutely no manufacturing going on at the house, but rather that "it basically looked like a storage facility." (Vol. I, p. 66.) Paul Brown of the Fort Worth Crime lab also searched the premises. (Vol. I, pp. 95-104.) Brown agreed with Hopper's analysis that the house was full of trash and junk, and that there was no manufacturing of phenylacetone on the premises. (Vol. I, pp. 103-105.) Brown also stated that the very ingredients necessary to manufacture phenylacetone were not present at the searched premises. (Vol. I, pp. 106-107.)

Except for his status as tenant of the house, the record reflects no testimony which connects Petitioner with the residence at 3463 Whittier on or about the time alleged in the indictment. Petitioner's landlord testified he did not know whether Petitioner ever moved into the house, whether any other parties occupied the house, who had keys to the house, or the last time Petitioner may have been at the house. Manning also acknowledged the possibility that Petitioner had never been at the house or had been away for weeks before the search. (Vol. I, pp. 23-24.) A resident of the house next door to the searched premises identified Petitioner, stating that Petitioner introduced himself when he began renting the house in March of 1985. (Vol. I, pp. 30-31.) However, she was unable to testify that Petitioner was near the premises at or about the date of the search. In fact, she testified that she did not see Petitioner very often after the first month of his lease, and that the last time she saw him at the house was two or three weeks prior to November 7, 1985. (Vol. I, pp. 31, 35.)

On November 23, 1985, the Irving Police were called regarding an odor at the Irving Ramada Inn. Officers Kelly, Collins, and Johnson responded to the call. (Vol. I, pp. 109-111, 123-124, 149-150). Ken Lewallyn, Fire Marshall for the City of Irving, was also called to the scene. (Vol. I, pp. 132-133). Lewallyn knocked on the door to the hotel room which was apparently the source of the odor and Petitioner answered the door. (Vol. I, p. 135). After a two to three minute delay to per-

mit Ethel Short to get out of the shower, Lewallyn entered the room. (Vol. I, p. 141). Using his gas meter, Lewallyn surveyed the room's contents and began picking up readings of combustible gases underneath the sink. The area under the sink contained boxes which were covered up with a blanket. (Vol. I, pp. 138-139). Officer Johnson looked underneath the blanket and took bottles out of the boxes which were covered. (Vol. I, pp. 155-156). These bottles and boxes were seized as evidence and were given to the Arlington Police Department after samples were taken by the DEA. (Vol. I, pp. 160-161). Ann Castillo, a DEA chemist, testified that some of the items seized contained traces of phenylacetone. (Vol. II, pp. 21-24).

However, another DEA chemist, Ed Albers, testified that manufacturing phenylacetone requires three separate ingredients: phenylacetic acid, sodium acetate and acetic anhydride. (Vol. I, pp. 16-17.) Without any of these elements, Albers testified that it is impossible to manufacture phenylacetone. (Vol. I, pp. 16-17). According to the expert testimony of Castillo, although traces of phenylacetone were found on the premises, none of the samples presented to her for examination contained phenylacetic acid, which she acknowledged as an indispensable precursor to phenylacetone, without which one cannot manufacture phenylacetone. (Vol. II, pp. 26-29, 37-39). Castillo affirmatively stated that there was "no scientific evidence" to support the presence of phenylacetic acid in any of the samples. (Vol. II, p. 39). Thus, according to the government's own experts, there is *no evidence* that Petitioner was involved in the manufacture of phenylacetone on or about November 23, 1985. Instead, the government's evidence clearly demonstrates the opposite to be true.

Petitioner Charlie Roach was charged by indictment with the following offenses:

1. Conspiracy to manufacture phenylacetone, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

2. Manufacturing phenylacetone, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), on or about November 7, 1985.

3. Manufacturing phenylacetone, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2, on or about November 23, 1985.

(Appendix, A-13, *infra*).

Petitioner was tried before a jury on his plea of not guilty and was found guilty of all three counts as charged in the indictment. Petitioner preserved his challenges to the sufficiency of the evidence on all counts by appropriate motion both at the close of the government's case and at the close of all the evidence. (Vol. II, pp. 68, 96).

The Court sentenced Petitioner on Count One to eight (8) years imprisonment. The Court sentenced Petitioner on Count Two to eight (8) years imprisonment, plus a special parole term of six (6) years. The Court sentenced Petitioner on Count Three to eight (8) years imprisonment, plus a special parole term of six (6) years. The sentences imposed in Counts Two and Three are to run concurrently with the sentence imposed in Count One.

Petitioner properly and timely gave Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit granted Petitioner's request for oral argument and heard oral argument on August 4, 1988. The Fifth Circuit then affirmed the trial court's conviction by an Order dated August 8, 1988. Petitioner timely filed a Petition for Rehearing with the Court of Appeals, which was denied on September 7, 1988.

REASONS FOR GRANTING THE WRIT

I. A Conviction for Conspiracy to Manufacture a Controlled Substance Is Inappropriate Absent Proof of an Underlying Agreement to Manufacture That Particular Controlled Substance.

Numerous authorities indicate that, in reviewing the sufficiency of the evidence in a criminal case, all evidence and reasonable inferences must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942). However, this favorable appellate viewpoint should not result in automatic approval of trial court convictions. Rather, the appellate court must carefully discern whether the government has proved each element of the offense in issue beyond a reasonable doubt. *In the matter of Winship*, 397 U.S. 358, 364 (1970); *United States v. Barrera*, 547 F.2d 1250, 1255, *cert. denied*, 104 S.Ct. 139 (5th Cir. 1977). A conviction may not rest on mere conjecture or suspicion. *United States v. Jackson*, 700 F.2d 181, 186, *cert. denied*, 104 S.Ct. 139 (5th Cir. 1983). A Court must not hesitate to overturn a jury's verdict when it is necessary to guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *Jackson*, 700 F.2d at 186, *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Juries must not be allowed to convict on mere suspicion and innuendo. *Jackson*, 700 F.2d at 186.

The full burden rests on the government in all criminal prosecutions to prove every element of the crime charged beyond a reasonable doubt. *United States v. Lang*, 528 F.2d 1280, 1286. When an appeals court concludes that the jury must necessarily have had a reasonable doubt, the conviction must be reversed. *Id.* at 1286. In a case based largely on circumstantial evidence, such as the present case, any inferences drawn from such evidence must be inconsistent with every reasonable hypothesis of innocence in order to support a conviction. *U.S. v. Gordon*, 580 F.2d 827, 833 (5th Cir. 1978); *United States v. Casey*, 540 F.2d 811, 814 (5th Cir. 1976). If from the record it

appears that the conviction cannot be sustained, plain error appears on the record and the judgment must be reversed. *Collins v. United States*, 65 F.2d 545, 546 (5th Cir. 1933).

In order for a conviction for a conspiracy to be affirmed on appeal, the government must prove three elements beyond a reasonable doubt:

1. that a conspiracy existed;
2. that each defendant knew of the existence of the conspiracy; and
3. with knowledge of the conspiracy, each defendant voluntarily joined it.

Gordon, 580 F.2d at 834; *United States v. White*, 569 F.2d 263, 267 (5th Cir. 1978). Since the record clearly indicates that the government has failed to prove each of the these essential elements beyond a reasonable doubt, plain error appears on the record and the Court should grant this Petition for Certiorari so that the judgment of the trial court may be reversed.

Because of the potential for prosecutorial abuse in utilizing conspiracy charges to convict individuals based upon innocent activities, this Court has repeatedly held that "proof of an agreement to enter into a conspiracy is not to be lightly inferred." *White*, 569 F.2d at 267, *United States v. Johnson*, 439 F.2d 885 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971). In a similar vein, the 2nd Circuit has held that a defendant's intent to enter into a conspiracy cannot be inferred merely from the presence and mere possession of drug paraphernalia. *United States v. Cepeda*, 768 F.2d 1515 (2nd Cir. 1985).

The government's evidence concerning the conspiracy count on which Petitioner was convicted is entirely insufficient. It is a house of cards with no foundation. There is absolutely no evidence of any agreement or conspiracy to manufacture phenylacetone, as is charged in Count One of the Indictment. All evidence is to the contrary! At the very most, there was an agreement by Petitioner to repay "one or two months of rent"

which Harrington loaned Petitioner by splitting the profits of whatever income Petitioner might realize "when he got back on his feet" (Vol. II, pp. 46-47). Such an agreement hardly amounts to an agreement to manufacture phenylacetone, which the government must prove beyond a reasonable doubt in order to properly convict Petitioner of Count One of the Indictment. *Gordon*, 580 F.2d at 834. This is even more clear in light of Harrington's testimony that he never had an agreement with Petitioner to manufacture phenylacetone. In light of the Fifth Circuit's admonition against "lightly inferring" a proof of agreement to enter into a conspiracy, Petitioner's conviction for conspiracy to manufacture phenylacetone should be reversed. *See White*, 569 F.2d at 267; *Johnson*, 439 F.2d 885.

Petitioner's co-defendant, Ethel Allen Short, clearly testified that there was no agreement to manufacture phenylacetone. (Vol. II, pp. 82-84). In fact, Short testified that she had no personal knowledge that Petitioner ever manufactured methamphetamine or phenylacetone. (Vol. II, p. 85). There is no evidence that Short knew of any agreement to manufacture phenylacetone.

Despite the government's best efforts to testify for Harrington, Harrington *never* stated that there indeed was an agreement to manufacture phenylacetone. To the contrary, Harrington completely denied the existence of any such agreement! (Vol. II, p. 56.) It is clear that there is insufficient evidence to support the jury's conviction of Petitioner for conspiracy to manufacture phenylacetone, and this court should grant this Petition so that the improper conviction may be reversed.

II. Petitioner's Conviction for "Manufacturing," Absent Proof of Any Such Action, Is an Overly Broad Application of 21 U.S.C. § 841(a)(1) in Violation of Petitioner's Constitutional Rights.

The issue of whether Petitioner "manufactured" phenylacetone on or about November 7, 1985 depends upon whether

Petitioner's activities and the evidence introduced by the government prove, beyond a reasonable doubt, that Petitioner's actions fall within the statutory definition of "manufacture":

> The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly, or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice.

21 U.S.C.A. § 802(15)(West 1987).

Although this statutory definition is unreasonably broad, it is clearly not broad enough to encompass Petitioner's acts as demonstrated by the evidence in this case. A review of other cases involving manufacturing convictions highlights the scarcity of evidence in the case at bar.

In a recent case, the 9th Circuit held that a manufacturing conviction was supported by sufficient evidence where there was testimony that the premises were outfitted for the specific purpose of manufacturing methamphetamine, where methamphetamine was found on the premises, and where there was testimony from one of the defendants who verified that the defendants were manufacturing methamphetamine at the premises. *United States v. Calabrese*, 825 F.2d 1342, 1348 (9th Cir. 1987). In a similar case, the 10th Circuit upheld a manufacturing conviction based upon evidence that ingredients used to manufacture PCP were found by the officers during the search of the premises along with samples of PCP. *United States v. Pennon*, 816 F.2d 527 (10th Cir. 1987). In *Pen-*

non, purchasers of PCP testified that they purchased PCP from the defendant at his home. *Id.*

In another case, the 10th Circuit upheld a manufacturing conviction based upon the following evidence:

1. The officers entered the defendant's apartment and discovered both defendants in the kitchen;

2. A working "speed lab," including paraphernalia and chemicals used to manufacture methamphetamine, was set up on the kitchen counter (including beakers, condensers, heating elements and drying lamps); the officers also found equipment essential to the manufacture of phenylacetic acid, an illegal precursor to methamphetamine, a gram-calibrated scale, small envelopes and syringes;

3. A small plastic bag containing methamphetamine, two papers with methamphetamine residue, 3 bottles of sludge containing methamphetamine and a large quantity of P2P, a precursor to methamphetamine.

In addition to this physical evidence, an expert analyst testified that between 200 and 250 grams of methamphetamine could have been produced from the P2P discovered in the apartment. *United States v. Zamora*, 784 F.2d 1025 (10th Cir. 1986).

In another case, a conviction for manufacturing was upheld where the defendant admitted manufacturing methamphetamine and knowing it was an illegal drug. Additionally, in this case, a working laboratory was found at the time of the arrest. The defendant claimed the methamphetamine was not for drug use, but was an intermediate step in extracting platinum from used catalytic converters of automobiles. *United States v. Lendmann*, 757 F.2d 916, 917 (7th Cir. 1985).

Finally, the 6th Circuit upheld a conviction for manufacturing methamphetamine where the wife of one co-conspirator identified the defendant as a key figure in the methamphetamine lab. Additionally, a search of the premises revealed sev-

eral five-gallon containers of ether and other chemicals, several syringes containing methamphetamine, laboratory equipment, and a chemical catalog containing materials which could be utilized to produce methamphetamine. Additionally, an expert testified that enough chemicals and equipment were present to manufacture 25 pounds of methamphetamine. *United States v. Bohlmann*, 625 F.2d 751, 752 (6th Cir. 1980).

By contrast, the evidence in the record in this case is entirely insufficient to support Petitioner's conviction for manufacturing phenylacetone on or about November 7, 1985. Petitioner's landlord, Gary Manning, testified that the house at 3463 Whittier contained large quantities of "trash" when he searched it. (Vol. I, pp. 18-21). However, he offered no testimony to connect Petitioner to the Whittier house other than his status as tenant. Manning testified that he did not know whether Petitioner ever moved into the house, did not know whether any other parties occupied the house, did not know who had keys to the house, and had no idea of the last time Petitioner may have been at the house. (Vol. I, pp. 23-24).

The next witness concerning Count Two was Pamela Parsons, who resides at 3467 Whittier, next door to Manning's rent house. Parsons' testimony also failed to connect Petitioner to the premises at the time alleged in Count Two. She stated that Petitioner was at the premises for the first month fairly often, " . . . but not too much after that." (Vol. I, p. 31). Parsons failed to connect Petitioner to any activity at the house. In fact, she testified that a number of people would come and go from the premises and that she could not say for sure who all was living at the house. (Vol. I, p. 34). Parsons further testified that the last time she saw Petitioner at the house was 2 or 3 weeks prior to November 7, 1985 and that she did not see anyone else at the house during that 2 to 3 week period. (Vol. I, p. 35).

Officer Craig Hopper of the Hurst Police Department testified regarding the condition of the house at 3463 Whittier when he entered the house after being called by Manning (the

landlord). (Vol. I, pp. 42-43). Hopper testified that there was a great deal of trash in the house. (Vol. I, p. 43). Although Hopper testified extensively about the conditions of the premises, Hopper offered no testimony to connect Petitioner with the manufacture of phenylacetone at the premises on or about November 7, 1985. In fact, he admitted that of the 52 fingerprints taken from the premises, only one print was Petitioner's. (Vol. I, p. 59).

Hopper also testified that he saw no one at the house either on October 2 or November 7, 1985, and that there was no surveillance to determine if anyone was at the house during that time. (Vol. I, pp. 64-65). He further testified that there could have been as many as 4 or 5 cooks using the Whittier house at any one time, and acknowledged that other people could have been at the house at any time. (Vol. I, pp. 65-66). Hopper admitted he had no knowledge regarding the last time Petitioner was at the house and classified the house as trash and "at best an abandoned facility," stating that there was *no manufacturing* actually going on at the time he entered the house, but rather that "it basically looked like a storage facility." (Vol. I, p. 66).

Paul Brown of the Fort Worth Crime Lab testified that he went to the house on Whittier on November 7, 1985 and took samples from ten (10) bottles in the house. (Vol. I, p. 104). He testified that two (2) of the samples, Exhibits 5 and 7, contained traces of phenylacetone. (Vol. I, pp. 95-101). However, Brown agreed with Hopper's analysis that the house was full of trash and junk, and that there was *no* manufacturing lab or working lab at that location. (Vol. I, pp. 103-105).

According to Brown's testimony, phenylacetone is manufactured by combining phenylacetic acid, acetic anhydride, and sodium acetate. However, he affirmatively stated that no acetic anhydride, no phenylacetic acid, and no confirmed sodium acetate was collected from the house. (Vol. I, pp. 106-107). Therefore, the very ingredients necessary to manufac-

ture phenylacetone, according to the government's expert, were *not present* at the searched premises.

The absence of these components, along with Hopper's and Brown's testimony that the house was not a manufacturing lab, should be carefully scrutinized by this Court. According to the government's own witnesses, not only is the evidence insufficient to convict Petitioner of manufacturing phenylacetone on or about November 7, 1985, but the evidence is also to the contrary – the government's own witnesses confirmed that there was no manufacturing of phenylacetone going on at the house on or about November 7, 1985. This evidence, in concert with the government's failure to connect Petitioner to the scene of the search on or about November 7, 1985, clearly indicates the insufficiency of the government's proof on Count Two. Where is the evidence, in terms of the statutory definition, of "the production, preparation, propagation, compounding, or processing of a drug or other substance" by Petitioner on or about November 7, 1985? There is none. Since the government has failed to prove beyond a reasonable doubt that Petitioner was manufacturing phenylacetone on or about November 7, 1985, this Court should grant this Petition for Certiorari so that the conviction on Count Two may be reversed.

III. A Conviction for Manufacturing a Controlled Substance Is Inappropriate Absent Proof of the Existence of the Indispensable Precursors to the Particular Controlled Substance in Issue.

On November 23, 1985, the Irving Police were called regarding an odor at the Irving Ramada Inn. Officers Kelly, Collins, and Johnson responded to the call. (Vol. I, pp. 109-111, 123-124, 149-150). Ken Lewallyn, Fire Marshall for the City of Irving, was also called to the scene. (Vol. I, pp. 132-133). Lewallyn knocked on the door to the hotel room which was apparently the source of the ether odor and Petitioner answered the door. (Vol. I, p. 135). After a two to three minute delay to permit Ethel Short to get out of the shower,

Lewallyn entered the room. (Vol. I, p. 141). Using his gas meter, Lewallyn surveyed the room's contents and began picking up readings of combustible gases underneath the sink. The area under the sink contained boxes which were covered up with a blanket. (Vol. I, pp. 138-139). Officer Johnson looked underneath the blanket and took bottles out of the boxes which were covered. (Vol. I, pp. 155-156). These bottles and boxes were seized as evidence and were given to the Arlington Police Department after samples were taken by the DEA. (Vol. I, pp. 160-161). Ann Castillo, a DEA chemist, testified that some of the items seized contained traces of phenylacetone. (Vol. II, pp. 21-24).

However, another DEA chemist, Ed Albers, testified that manufacturing phenylacetone requires phenylacetic acid, sodium acetate and acetic anhydride. Without any of these elements, Albers testified that it is impossible to manufacture phenylacetone. (Vol. I, pp. 16-17). According to the expert testimony of Ms. Castillo, although traces of phenylacetone were found on the premises, none of the samples presented to her for examination contained phenylacetic acid, which she acknowledged as an indispensable precursor to phenylacetone. (Vol. II, pp. 26-29, 37-39). Castillo affirmatively stated that there was "no scientific evidence" to support the presence of phenylacetic acid in any of the samples. (Vol. II, p. 39). Thus, according to the government's own experts, there is *no evidence* that Petitioner was involved in the manufacture of phenylacetone on or about November 23, 1985.

If the government had chosen to indict Petitioner for possession of phenylacetone on or about November 23, 1985, perhaps the evidence would support a conviction. However, that is not the case. Since the government chose to indict Petitioner, instead, for manufacturing phenylacetone, his conviction should be reversed as the government has failed to prove Petitioner was manufacturing phenylacetone beyond a reasonable doubt. As stated in Section II above, the statutory definition of "manufacture" requires that the government prove "production, preparation, propagation, compounding, or pro-

cessing of a drug. . . ." There is not sufficient evidence to demonstrate manufacturing beyond a reasonable doubt with reference to Count Three of Petitioner's indictment. Accordingly, this Court should grant this Petition for Certiorari so that Petitioner's conviction on this Count may be reversed.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

G. Dennis Sheehan
1300 First RepublicBank Tower
801 Cherry Street
Fort Worth, Texas 76102
(817) 878-0600

Counsel of Record

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1048

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLIE ROACH AND ETHEL ALLEN SHORT,
Defendants-Appellants.

**Appeal from the United States District Court
for the Northern District of Texas
(CR-4-87-050)**

(August 8, 1988)

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

PER CURIAM:*

Defendants Charlie Roach and Ethel Short appeal their convictions of conspiring to manufacture and manufacturing the controlled substance phenylacetone, in violation of 21 U.S.C. §§ 841(a), 846 and 18 U.S.C. § 2. The sole contention raised by Roach and Short on appeal is that the evidence presented to the jury was insufficient to sustain their convictions. We reject this contention and affirm.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

In March 1985, defendant Charlie Roach entered into an agreement with Tim Harrington to manufacture amphetamine. Pursuant to the agreement between Harrington and Roach, Harrington was to receive one-half of any profits received by Roach in the manufacture of amphetamine. Thereafter, with financing from Harrington, Roach rented a residence in Fort Worth, Texas to house an amphetamine lab. At the time Roach rented the Fort Worth residence, the house was relatively clean and empty; however, when the owner reentered the home after Roach ceased paying rent in November 1985, the owner discovered that the house was full of trash and the windows of the house had been covered with trash bags and tape. The owner subsequently notified Fort Worth police who searched the residence. Items found at the house included acetone cans, starting fluid cans, glassware, a heating element and chemicals used to manufacture amphetamine. In addition to the above items, the trash at the Fort Worth home also included samples of liquid containing the controlled substance phenylacetone–a precursor chemical in the production of amphetamine and methamphetamine. Further, the police found a sheet of paper with instructions for the manufacture of amphetamine among the refuse. Finally, the police lifted Roach's fingerprint off a one gallon acetone can at the Fort Worth home.

Thereafter, on November 23, 1985, Roach telephoned Harrington and informed him that Roach and Ethel Short were finishing up a "cook" at the Ramada Inn in Irving, Texas. Coincidentally, Irving police officers and a fire marshal responded to a call that same day at the Irving Ramada Inn after receiving a report of a strong chemical odor emanating from a motel room at that location. Apparently, the odor was so strong that it could be smelled 50 to 75 yards from the motel room. After arriving at the motel room, the fire marshal sought admittance to the room. The marshal and officers maintain that Roach made them wait approximately ten minutes before entering the room. Roach, however, contends that he only delayed two to three minutes in allowing the officials in the room. To explain the delay, Roach told the marshal that his wife was in the shower.

Upon entering the room, the officers observed that the room contained a thick fog which the officers described as too thick to be merely mist from a shower. At this point, the officers also observed in plain view a small baggie of marijuana on the table in the room and subsequently arrested both Roach and defendant Ethel Short, who was found in the room, for possession. The officers then continued to search the motel room for the source of the chemical odor. Among other items, the search ultimately revealed bottles of chemicals, boxes containing jars and numerous bottles, and a heating element. One of the chemical substances found in the motel room was phenylacetone. Additionally, the officers found sodium acetate, with a strong odor of phenylacetic acid, such as is mixed in order to make phenylacetone.

The above facts are those maintained by the Government at trial. Roach, however, contends that the only agreement which he ever entered into with Harrington was an agreement to repay Harrington approximately $600 to $800 on a personal loan. Presumably, Roach's payments were to be made from money which Roach received in the business of repairing automobiles. To explain her presence in the Ramada Inn motel room at the time the chemicals were found by police officers in Irving, Short maintains that she was merely staying at the Ramada Inn with Roach because she was to ride to Dallas with Roach the next morning. Short denies any knowledge of manufacturing amphetamine or the precursor chemical phenylacetone.

Following a jury trial on April 8, 1987, Roach and Short were convicted of the following counts: (1) conspiring to manufacture phenylacetone in violation of 21 U.S.C. § 846; and (2) manufacturing phenylacetone and aiding and abetting in the manufacture of phenylacetone in violation of 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2. Roach was separately convicted of one count of manufacturing phenylacetone on or about November 7, 1985, at the Fort Worth home in violation of 21 U.S.C. § 846. Roach was subsequently sentenced by the district court to concurrent terms of eight years imprisonment on each count and six years' special parole as to each count except for the conspiracy count. Short was sentenced to concurrent four year terms on each count and three years special parole

on the manufacturing count. Both Roach and Short now assert the instant appeal from their convictions.

II. DISCUSSION

On appeal, Roach and Short contend that the evidence adduced at trial was insufficient to support their convictions. In reviewing a sufficiency of the evidence claim following a criminal conviction, this Court will sustain the conviction if "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Santisteban*, 833 F.2d 513, 516 (5th Cir. 1987) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Applying the above deferential standard of review to the jury's determination in the instant case, we conclude that the evidence was sufficient to sustain the convictions of Roach and Short on each count.[1]

A. Conspiracy to Manufacture

To sustain its burden of proof in a criminal conspiracy case, the Government must prove beyond a reasonable doubt "that a conspiracy existed, that the accused knew about it, and, with that knowledge, voluntarily joined it." *United States v. Michelena-Orovio*, 719 F.2d 738, 742 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1104 (1984) (quoting *United States v. White*, 569 F.2d 263, 267 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978)). The above elements may be proven by either circumstantial or direct evidence. *United States v. Gordon*, 580 F.2d 827, 834 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). Moreover, "it was within the province, indeed the duty, of the jury to resolve any conflicting testimony, to determine whether to believe a particular witness, and to decide the inferences rea-

[1]The Government contends that because Short failed to reassert a motion for judgment of acquittal after the close of her case-in-chief, the relevant standard for reversal in reviewing the evidence as to Short's convictions is whether Short's conviction constituted a "manifest miscarriage of justice." *United States v. Maldonado*, 735 F.2d 809, 817 (5th Cir. 1984). We conclude that the evidence is sufficient to sustain Short's convictions under either the *Maldonado* or the *Santisteban* standard.

sonably to be drawn from credible testimony offered at trial." *Id.* at 835.

After reviewing the record, we are persuaded that the evidence was sufficient to sustain Roach's conviction on the conspiracy count. Specifically, a rational jury could have found the essential elements of a criminal conspiracy from Harrington's testimony regarding the agreement between Harrington and Roach to manufacture amphetamine, Roach's actions in running the Fort Worth home which was later found to contain remnants of a drug lab, and Roach's presence at the Ramada Inn motel room containing evidence of a drug lab.

Similarly, we conclude that the evidence is sufficient to sustain Short's conviction on the conspiracy count. While a closer factual determination than that presented by Roach's sufficiency challenge, our conclusion is bolstered by the highly deferential standard of review afforded to the jury's determination. The particular evidence upon which the Government relied at trial to prove Short's participation in the charged conspiracy included testimony by Harrington that Roach informed him that Roach and Short were finishing a "cook" at the Ramada Inn motel. Further, evidence was presented establishing that Short was left alone in the motel room with the lab equipment and chemicals which were emanating a distinct odor detectable some distance from the motel room. From this fact, the jury could reasonably infer that Short exercised control over the chemicals, a further factor supporting the jury's conclusion that Short participated in the conspiracy to manufacture phenylacetone. *See United States v. Garcia*, 655 F.2d 59, 63 (5th Cir. 1981). Finally, Short was voluntarily present at a location, the motel room, which emitted a chemical odor strong enough to prompt a call to officials to investigate and which was later discovered to contain evidence of a drug lab. From the above evidence, a rational jury could have found beyond a reasonable doubt that Short knew of and voluntarily joined in a conspiracy to manufacture phenylacetone with Roach and Harrington.

B. Manufacturing Phenylacetone

21 U.S.C. § 802(15) defines "manufacture" in the following manner:

> (15) The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labelling or relabelling of its container;
>
> . . .

Addressing first Roach's conviction for manufacturing phenylacetone on or about November 7, 1985, at the Fort Worth residence, we are persuaded that the evidence was sufficient to sustain Roach's conviction on this count. In making his insufficiency claim, Roach maintains that no evidence was presented connecting him to the Fort Worth residence, and further, that certain chemicals necessary to the production of phenylacetone were absent from the Fort Worth home. However, to rebut Roach's argument, the Government notes that evidence was presented to the jury that Roach was the individual renting the Fort Worth residence, that Roach had been observed at the house by a neighbor within two or three weeks of the search by law enforcement officials, and that Roach had paid a neighbor's son to mow the yard at the Fort Worth home. As to evidence of chemicals necessary to the production of phenylacetone which were found at the Fort Worth residence, the record reveals that the Government introduced evidence at trial of discarded lab equipment discovered at the Fort Worth home, as well as various samples of liquids containing phenylacetone and other chemicals used in the manufacture of that drug. Further, the police found an instruction sheet on how to manufacture amphetamine at the Fort Worth residence.

Finally, the evidence is also sufficient to sustain both Roach and Short's convictions on the count of manufacturing phenylacetone and aiding and abetting in the manufacture of that substance at the Ramada Inn in Irving on November 23, 1985. Specifically, the Government offered testimony by Harrington that Roach had informed Harrington that Roach and Short were finishing up a "cook" at the Ramada Inn. Further, Roach and Short were found in the motel room which was emanating a strong chemical odor. Finally, the motel room contained phenylacetone and various pieces of equipment necessary to the production of that drug. In light of the evidence adduced by the Government at trial, we cannot say that a reasonable jury could not have found Roach and Short guilty beyond a reasonable doubt of the counts with which they were charged. We therefore affirm.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1048

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

CHARLIE ROACH
and ETHEL ALLEN SHORT, Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF TEXAS

ON PETITIONS FOR REHEARING
(September 7, 1988)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

NO. CR4-87-00050-K

UNITED STATES OF AMERICA

versus

CHARLIE ROACH
1514 Loving Avenue
FORT WORTH, TEXAS 76106
Soc. Sec. No. 449-94-2365
G. DENNIS SHEEHAN – Appt., Attorney for the Defendant

THE DEFENDANT ENTERED A PLEA OF:
[☐ guilty ☐ nolo contendere] as to count(s) _____, and
☒ not guilty as to count(s) 1, 2, and 3.

THERE WAS A:
[☐ finding ☒ verdict] of guilty as to count(s) 1, 2 and 3.

THERE WAS A:
[☐ finding ☐ verdict] of not guilty as to count(s) _____.
☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy, Manufacturing Controlled Substance, Phenylacetone, and Aiding and Abetting (3 Counts) in Violation of Title 21 USC 846, 841(a)(1) and Title 18 USC 2. Offense committed Count 1 March 18, 1985 to November 23, 1985; Count 2 November 7, 1985; and Count 3 November 23, 1985.

IT IS THE JUDGMENT OF THIS COURT THAT: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on Count 1 of the Indictment. The

defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on Count 2 of the Indictment plus a Special Parole Term of six (6) years. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on Count 3 of the Indictment plus a Special Parole Term of six (6) years. Said sentence imposed in Count 2 and said sentence imposed in Count 3 is to run concurrent with sentence imposed in Count 1. IT IS FURTHER ORDERED that defendant report to the U.S. Marshal's Office no later than Monday, February 8, 1988, 10:00 a.m.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ One Hundred Fifty ($150.00) pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2 and 3 as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

January 15, 1988

Date of Imposition of Sentence

/s/ David O. Belew, Jr.
Signature of Judicial Officer

David O. Belew, Jr., U.S. District Judge

Name and Title of Judicial Officer

Jan. 21, 1988

Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered _____ to
Date

_____ at _____,
the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. CR4-87-050

UNITED STATES OF AMERICA

versus

CHARLIE ROACH
ETHEL ALLEN SHORT

The Grand Jury charges:

COUNT 1

From on or about March 18, 1985, and continuing until on or about November 23, 1985, in the Fort Worth Division of the Northern District of Texas and elsewhere, CHARLIE ROACH and ETHEL ALLEN SHORT, defendants and co-conspirators herein, wilfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each other, and with other persons known and unknown to the grand jury, knowingly and intentionally to manufacture phenylacetone, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

COUNT 2

On or about November 7, 1985, in the Fort Worth Division of the Northern District of Texas, CHARLIE ROACH, defendant herein, unlawfully, knowingly and intentionally did manufacture phenylacetone, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT 3

On or about November 23, 1985, in the Northern District of Texas, CHARLIE ROACH and ETHEL ALLEN SHORT, defendants herein, unlawfully, knowingly and intentionally did manufacture phenylacetone, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL.
/s/ William J. Kelly, Jr.
Foreman

/s/ Marvin Collins
United States Attorney

/s/ J. Michael Worley
Assistant United States Attorney
310 U.S. Courthouse
Fort Worth, Texas 76102
Telephone: 817-334-3291